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No. 82-1144

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1968, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.*, requires a federal agency to engage in collective bargaining over petitioner's proposals concerning union participation in development of employee performance standards and submission to arbitration of disputes with respect to such performance standards.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 691 F.2d 565. The decision and order of the Federal Labor Relations Authority (Pet. App. 44a-61a) is reported at 5 F.L.R.A. No. 14.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1982. The petition for a writ of certiorari was filed on January 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 1101 *et seq.*, are reprinted at Pet. App. 101a-160a.

STATEMENT

1. In the course of collective bargaining between the Department of Transportation, Saint Lawrence Seaway Development Corporation ("the agency") and petitioner, American Federation of Government Employees, AFL-CIO, Local 1968, a dispute developed concerning the negotiability of several of petitioner's proposals relating to a performance appraisal system for agency employees. The agency refused to bargain with respect to the italicized portions of the following proposals, on the basis that it considered them to be nonnegotiable (Pet. App. 4a-5a):

PROPOSAL III

Section 4. There shall be no secret studies bearing on performance appraisals. All studies conducted by the [employer] will be conducted on typical workers under normal working conditions. *The Union shall participate on an equal basis in the development or revisions of all measures of performance and studies including but not limited to selection of typical workers and conditions. If agreement cannot be reached, formal negotiations will be convened. Any impasses will be referred to the Federal Service Impasses Panel for resolution.*

PROPOSAL IV

Section 6. Any disputes under this Article may be resolved under the negotiated grievance procedure including but not limited to:

1. *Challenges to critical elements of position.*

2. *The measure of performance as set forth in performance standards.*

* * * * *

Petitioner brought the negotiability dispute before the Federal Labor Relations Authority ("FLRA"), the federal agency charged with implementing the provisions of the labor-management relations chapter of the Civil Service Reform Act of 1978, Title VII, 5 U.S.C. (Supp. V) 7101 *et seq.*, ("Labor-Management Act").[1] The FLRA held (Pet. App. 44a-61a) that the disputed portions of the bargaining proposals directly interfered with areas confided to management under 5 U.S.C. (Supp. V) 7106(a) and thus were outside the agency's statutory duty to bargain. The FLRA relied on its earlier decision in *National Treasury Employees Union* and *Department of the Treasury, Bureau of the Public Debt*, 3 F.L.R.A. 769 (1980), aff'd, 691 F.2d 553 (D.C. Cir. 1982).[2] In *Bureau of the Public Debt* the FLRA held that establishment of performance standards and identification of critical elements under an employee performance appraisal system are matters reserved to the agency by virtue of its reserved management rights under Section 7106(a) to direct employees and assign work.

Based on its holding in *Bureau of the Public Debt*, the FLRA found (Pet. App. 52a-53a) that petitioner's Proposal III was outside the scope of the agency's statutory bargaining obligation, since it envisioned bargaining to impasse on the content of performance standards and thus was inconsistent with management's rights to direct employees and assign work. Similarly, the FLRA determined (*id.* at 57a-58a) that the disputed portion of Proposal IV was non-

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[1]The FLRA has the statutory responsibility to resolve negotiability disputes that arise in the course of collective bargaining between an agency and an exclusive representative of its employees. 5 U.S.C. (Supp. V) 7105(a)(2)(E), 7117(c).

[2]The decision of the FLRA in *Bureau of the Public Debt* is reprinted at Pet. App. 62a-83a. The decision of the District of Columbia Circuit affirming the FLRA's decision is reprinted at Pet. App. 19a-43a.

negotiable because it would permit direct challenges to performance standards and critical job elements and would allow arbitrators to substitute their notions of proper standards and elements for those of management.

2. Petitioner filed a petition for review of the FLRA decision in the court of appeals, pursuant to 5 U.S.C. (Supp. V) 7123(a). The court affirmed (Pet. App. 1a-18a) the FLRA decision, relying on principles it had articulated in *Department of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982), and in *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982). The court held, *inter alia*, that the FLRA had concluded correctly that Proposals III and IV were nonnegotiable, because they would restrict management's authority to establish performance standards and critical job elements, and thus would interfere with the agency's statutory prerogative to direct employees and assign work (Pet. App. 9a, 15a-17a).[3]

ARGUMENT

Petitioner contends that Title VII of the Civil Service Reform Act, 5 U.S.C. (Supp. V) 7101 *et seq.* (the "Labor-Management Act"), requires that a federal agency engage in collective bargaining over proposals under which petitioner would participate equally in development or revision of employee performance standards and disputes concerning such performance standards and critical job elements would be submitted to arbitration. The court of appeals rejected petitioner's contention, concluding that the FLRA had interpreted the statute in a reasonable manner in finding such proposals to be nonnegotiable. That decision,

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[3]The FLRA and the court of appeals also found nonnegotiable several other proposals that were the subject of dispute between petitioner and the agency. Petitioner does not now seek review with respect to those proposals (Pet. 3-4 n.2).

which is correct, does not conflict with the decision of any other court of appeals or with any decision of this Court. Therefore, further review is not warranted.

1. Petitioner contends (Pet. 11-22) that the language and legislative history of the Labor-Management Act support its view that federal agencies are required to negotiate concerning performance standards and critical job elements. However, both the FLRA and the court of appeals found persuasive indications to the contrary. The key provision of the Act, 5 U.S.C. (Supp. V) 7106(a), states that, subject to Subsection (b) of that Section, nothing in the Act shall affect the authority of an agency, *inter alia*, to "direct" employees and "assign work." The FLRA concluded that development and application of performance standards were within the scope of these rights reserved to management, since such standards would affect the manner in which employees could be expected to perform, including their level of output.[4]

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[4]Petitioner contends (Pet. 23) that there is a difference between directing and assigning work to an employee, on the one hand, and making post hoc decisions about the consequences of an employee's success or failure in carrying out such directions or assignments. But performance standards inevitably have more than a post hoc effect if they are applied properly. As the FLRA concluded in *Bureau of the Public Debt* (Pet. App. 73a), performance standards "are not merely measures of employee performance. They go to the levels of output and the quality of the work product." The FLRA here recognized that Proposal IV would allow arbitrators to "render awards which would require the agency to use different critical elements or set different standards" (*id.* at 57a). Thus, such standards operate to establish requirements in connection with the agency's direction of employees and assignment of work.

Petitioner also criticizes the FLRA's reasoning on the ground that the proposals at issue here, unlike those in *Bureau of the Public Debt*, do not seek to quantify a measure of performance and therefore must be less intrusive (Pet. 22). The court of appeals correctly concluded that this distinction is not significant to the decision on negotiability (Pet. App. 15a). As the court of appeals found (*id.* at 15a-16a), the proposals

The FLRA's conclusion that the proposals at issue would interfere with management's statutory prerogative to "direct" employees and "assign work," and are therefore nonnegotiable under the terms of the statute, is clearly reasonable. Proposal III, which would require that petitioner be given an equal voice in development of measures of performance and that disputes be referred to the Federal Service Impasses Panel, obviously would restrict management's authority "by insisting that it be exercised only with union approval" (Pet. App. 14a, 16a).[5] It is equally clear that Proposal IV would restrict management authority, since it would "allow arbitrators to substitute their notions of proper [performance] standards and [critical job] elements for those of management" (*id.* at 16a). The court of appeals correctly concluded that there was no basis for upsetting the judgment of the body charged by Congress with deciding negotiability disputes in the first instance.

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here, while not expressed in numerical terms, would, if implemented, restrict management's authority significantly by substituting the judgment of union and arbitrator with respect to what performance standards and critical job elements are proper.

Petitioner suggests (Pet. 23-24) that the FLRA was primarily concerned that the proposals would delay the application of a standard and element to a particular employee. Nothing in the decision suggests that the FLRA based its conclusion on any such concern.

[5]The court of appeals properly rejected petitioner's contention (Pet. 16-17) that the FLRA's ruling effectively reads the Federal Service Impasses Panel out of the statute by allowing the FLRA to examine the merits of a proposal rather than simply its negotiability. The FLRA is charged by statute with resolving negotiability disputes, and the content of a proposal clearly has some relevance to negotiability. As the court of appeals pointed out (Pet. App. 18a n.88), petitioner's argument "would dictate that because any given employee proposal is simply a proposal, not yet a command to management, it is a proper subject of mandatory bargaining between employees and management." Of course, the Federal Service Impasses Panel retains its full statutory responsibility for resolving impasses that arise in the course of collective bargaining on negotiable issues.

The FLRA's conclusion is consistent with the legislative history of the Act. Petitioner points to various statements by Members of Congress to the effect that the management rights provision of the statute should be given a narrow reading (Pet. 17-19). But other statements in the legislative history make it clear that Congress intended the reservation of management rights to be meaningful.[6] Thus, the statements cited by petitioner cannot be read in isolation. Moreover, there are numerous indications, including statements in the House and Senate reports, that Congress intended the Act to be interpreted in a manner consistent with an effective and efficient government. See, *e.g.*, S. Rep. No. 95-969, 95th Cong., 2d Sess. 2-4 (1978); H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 3 (1978); and other legislative history cited at Pet. App. 34a. The Act itself contains a provision to that effect. See 5 U.S.C. (Supp. V) 7101(b). As the court of appeals recognized in *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982), reservation to management of the formulation of performance standards and critical job elements furthers this legislative goal (Pet. App. 38a-39a):

> Without a doubt, the right to determine what work will be done, and by whom and when it is to be done, is at the very core of successful management of the employer's business. * * * The Authority's construction of

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[6]See, *e.g.*, 124 Cong. Rec. 29187 (1978) (remarks of Rep. Clay); *id.* at 29199 (remarks of Rep. W. Ford).

Petitioner also cites (Pet. 19-20) a statement by the Director of the Office of Personnel Management during hearings on the legislation. While that statement suggests that some aspects of performance appraisal systems, including development of performance standards, might be subject to bargaining, no such suggestion was made by Congress itself. Instead, Representative Udall addressed bargaining about standards for establishing promotion certificates, but made no reference to performance standards. See 124 Cong. Rec. 29174 (1978); Pet. App. 9a-12a, 74a-75a.

> Section 7106(a) as a reservation of this invaluable right to management, thereby insulating it from dilution at the bargaining table, is thus fully obedient to the congressional command that the Act be interpreted in a manner consistent with the exigencies of efficient government.

Petitioner points out that by its terms Section 7106(a) is "subject to" Section 7106(b), which states that negotiation will not be precluded with respect to "procedures which management officials of the agency will observe in exercising any authority under this section." Petitioner contends that the proposals at issue here relate to "procedures" rather than substance and thus are negotiable under Section 7106(b). However, as the court of appeals recognized (Pet. App. 13a, quoting *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1161 (D.C. Cir. 1981)), "demarcation of substance and procedure 'involves questions of judgment and balance, about which reasonable people could easily differ,' and was a task best performed by the Authority itself." Here the FLRA concluded that the proposals at issue would directly interfere with management rights and thus could not be characterized as procedural.[7] The court of appeals

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[7]Petitioner claims (Pet. 14-17) that the FLRA and the court of appeals erred in applying a "direct interference" test, rather than an "acting at all" test, in determining whether the proposals at issue are procedural or substantive. The District of Columbia Circuit has applied these two tests in different types of situations. In the case of "purely procedural steps," the court will find nonnegotiability only if a proposal precludes management from "acting at all;" in the case of proposals cast in procedural language but impinging on substantive management decisions the court will find nonnegotiability if implementation would "directly interfere" with the exercise of reserved management rights (Pet. App. 13a). The proposals at issue here were clearly more than "purely procedural steps."

In petitioner's view (Pet. 12), "the statute places no limitation on the right of parties to negotiate procedures relating to the direction of

affirmed this judgment, correctly noting that the disputed proposals "can, at best, be described as propositions cloaked in procedural garb which encroach upon management's substantive authority" (Pet. App. 14a). Indeed, the court found that petitioner's approach to whether proposals are procedural or substantive is "unduly literal" and "would eviscerate all of the management rights that Section 7106(a) is designed to protect" (*id.* at 13a).

Petitioner urges that the proposals at issue here must be negotiable because, in passing the Labor-Management Act, Congress intended to broaden the scope of collective bargaining over conditions of employment and especially to provide for employee participation in performance appraisal systems, pursuant to 5 U.S.C. (Supp. V) 4302(a). Petitioner's suggestion (Pet. 10-11) that the decision of the court below undermines this congressional intent is misguided. Under the terms of the statute the duty to bargain does not extend to proposals inconsistent with federal law or regulations. See 5 U.S.C. (Supp. V) 7117(a)(1). While there is no question that Congress intended to broaden the scope of collective bargaining in some respects, it is equally clear that that process was to be subject to the reservation of management rights in 5 U.S.C. (Supp. V) 7106(a).[8]

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employees or the assignment of work, even if a proposal would somehow 'interfere' with managerial authority in this area." That view is simply too narrow; its effect is to read out of the statute the reservation of management rights found in Section 7106(a).

[8]Petitioner contends that because Congress intended to broaden the scope of collective bargaining the present case cannot be reconciled with the decision of the Federal Labor Relations Council (the predecessor of the FLRA) in *Patent Office Professional Association* and *U.S. Patent Office*, 3 F.L.R.C. 635 (1967). In *Patent Office*, the Council found that certain proposals concerning production expectations for employees were negotiable. The FLRA specifically considered the relevance of *Patent Office* in its decision in *Bureau of the Public Debt* (Pet. App. 62a-83a). It concluded there that *Patent Office* was inapplicable

Moreover, Section 4302(a) does not require that agency encouragement of employee participation in establishing performance standards take the form of union participation in formulation of such standards. As both the court below and the FLRA have recognized (see Pet. App. 41a-42a, 76a-80a), such employee participation may occur in a variety of ways, some of which involve collective bargaining with respect to certain aspects of the performance appraisal process. This view is consistent with that of the Office of Personnel Management (*id.* at 42a, 79a). The decision in this case in no way undermines Section 4302(a).

2. Petitioner suggests (Pet. 25-26) that this Court should grant certiorari because of the importance and recurring nature of issues concerning the scope of federal sector collective bargaining and management rights. In fact, the first cases addressing the negotiability of performance standards and critical job elements under the 1978 Labor-Management Act have only recently been decided by the courts of appeals. Other such cases are now pending,[9] and no conflicts between the courts of appeals have yet developed in this area. Thus, consideration by the Court of the issues presented by this case appears both unnecessary and premature.

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because, *inter alia*, the performance standards and critical elements now relevant are governed by the requirements of Title II of the Civil Service Reform Act, 5 U.S.C. (Supp. V) 4301 *et seq.*, which "differ appreciably from the performance appraisal practices which were in effect at the time of the Council's decision" (Pet. App. 73a).

[9]See, *e.g.*, *American Federation of Government Employees, AFL-CIO, Local 1923* v. *FLRA*, appeal pending, No. 82-1483 (4th Cir.); *National Treasury Employees Union* v. *FLRA*, No. 82-7154 (9th Cir. Mar. 14, 1983) (remanding for further explanation of FLRA reasoning).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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